

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 02-28

File: 02-186-4

BACKGROUND

This matter has a lengthy history. The Applicant (PB) is a day home operator, licenced by the Department of Education, Culture and Employment. A request was made by A.K, a former customer of the day home, for copies of certain information held by the Department concerning PB and her day home. AK and PB have been involved in a dispute arising from an incident which occurred while the PB was caring for AK's child.

When the initial request for information was made, the head of the Department of Education, Culture and Employment (ECE) made a request of the Information and Privacy Commissioner to authorize the public body to disregard the request for information. Having reviewed the matter, I issued a decision (Decision 02-026) in which I refused the request to disregard the application for information.

The Department then informed PB and AK that they had decided to provide AK with partial disclosure of the information he had initially requested about the day home. Notice was given to both PB and AK that that was going to be done. PB in turn requested that I review that decision by letter received in my office on June 8th.

In addition to this, PB requested ECE to make certain corrections to the information in her file pursuant to section 45(1) of the Access to Information and Protection of Privacy Act. In particular, as far as I can determine, PB's concern was that there were no notes of certain telephone discussions between herself and employees of the department on the file.

ECE responded to PB's request for corrections to her file by advising that there were no written notes of the telephone discussions made at the time of the discussions and that they were, therefore, unable to make corrections to documents that did not exist. Furthermore, the letter to PB indicated that the department was not in a position to create notes of telephone discussions which had happened several months earlier because the employees could not recall exactly what was said during the conversations and there was a good chance that any notes made so long after the fact might not accurately reflect what was said. PB has asked that I review this decision not to make corrections to her file.

The Department was given the opportunity to provide me with their comments with respect to PB's concerns. I also asked for and received a copy of PB's entire file to assist me in assessing the request for review.

ISSUES

There are two clear issues which I have been asked to review. The first is whether the Department properly refused to "correct" PB's personal information. The second is whether AK should receive an edited version of PB's file in response to his request for information and, if so, whether the Department's proposed severing of certain information has been done in accordance with the exemptions provided for in the Access to Information and Protection of Privacy Act.

DISCUSSION

1. GENERAL

Before dealing with the main issues, it is important to outline what the purpose and limitations of the *Access to Information and Protection of Privacy Act* are and how those correlate to PB's position. Her concern, which has been well articulated throughout, is

that AK may use any information he might obtain as a result of his request for information to continue or escalate the business dispute between them. There is no doubt that her dealings with AK have been very unpleasant and stressful. She has a genuine concern about what AK might do with the information he might receive in response to her request for information. I understand why she is taking the position that AK should not have access to her day home file. That being said, the *Access to Information and Protection of Privacy Act* has a limited mandate. My role is not to judge the merits of the dispute between the two individuals, or even to consider how the disclosure of the information in question might affect that dispute. My only role is to interpret and apply the provisions of the *Access to Information and Protection of Privacy Act* and to make recommendations to the department with respect to how that act should be interpreted in the context of the requests made. The dispute between the parties is a civil matter which must be dealt with in another forum. Furthermore, the Act provides the Information and Privacy Commissioner with no mandate to test the accuracy of government records. My role is only to consider whether, within the context of the *Access to Information and Protection of Privacy Act*, access to information should be allowed or denied.

2. CORRECTION TO PERSONAL INFORMATION

PB has asked that notes be created to reflect telephone discussions between herself and certain employees of the Department of Education, Culture and Employment some time in early September, 2001. She takes the position that if records are going to be released to AK, they should at least be complete.

The only provision of the *Access to Information and Protection of Privacy Act* which deals with the correction of records in the hands of a public body is section 45 which states as follows:

1. An individual who believes that there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.
2. Where a correction is not made in response to a request under subsection (1), the head of the public body shall make a note of the requested correction on or cross-referenced to the information to which it relates.
3. Within 30 days of after the request is received, the head of the public body that receives the request shall give written notice to the individual that :
 1. the correction has been made; or
 2. a note of the requested correction has been made under subsection (2).

There are a couple of things to note about this section of the Act. The section does not provide for the correction of any information held by the government. It allows only for a correction of a person's personal information. Personal information is defined in the act as information about an identifiable individual, including:

- (a) the individual's name, home or business address or home or business telephone number,
- (b) the individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
- (c) the individual's age, sex, sexual orientation, marital status or family status,
- (d) an identifying number, symbol or other particular assigned to the individual,
- (e) the individual's fingerprints, blood type or inheritable characteristics,

- (f) information about the individual's health and health care history, including information about a physical or mental disability,
- (g) information about the individual's educational, financial, criminal or employment history,
- (h) anyone else's opinions about the individual,
- (i) the individual's personal opinions, except where they are about someone else;

The first question to answer, therefore, is whether the information which PB wishes to have corrected can be classified as "personal information". In my opinion, it cannot. Assuming, for the moment, that notes had been made of the discussions between PB and an employee of the department, those notes would not reflect factual personal information of the type listed above. Instead, such notes would reflect the nature of the conversation and the writer's subjective interpretation or paraphrase of what was said and, perhaps, who said it. Although there might be bits of personal information within notes made of a particular telephone call, such as names or telephone numbers, the notes as a whole would not constitute personal information as contemplated by the Act.

Even if this were not the case, there is a difference between making a correction to a record (which implies that a record exists) and creating records which do not otherwise exist. What PB is really asking is that the department create a record of a telephone call that took place many months ago. The *Access to Information and Protection of Privacy (ATIPP) Act* deals only with rights of access to existing records. There may be other legislation which deals with the creation and management of public records. The ATIPP Act, however, does not and nothing in the Act gives this office any jurisdiction to comment on or deal with the accuracy or completeness of the records made. If there is no record, there is simply nothing to correct.

In the circumstances of this case, therefore, section 45 simply does not apply. That having been said, however, I would suggest that the spirit of the legislation is such that

a note respecting PB's request should be made on her file in accordance with section 45(2), if that has not already been done.

3. Access to Information Request

AK has requested copies of "all information relating to the family day home or the operator in her capacity as a proprietor of this day home".

PB is a third party who objects to the release of the information. Section 33 of the *Access to Information and Protection of Privacy Act* outlines who has the onus in any given situation to establish when access should or should not be granted. It reads as follows:

33. (1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

(2) On a review of a decision to refuse an applicant access to all or part of a record that contains personal information about a third party, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations.

(3) On a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations; and

(b) in any other case, the onus is on the third party to establish that the applicant has no right of access under this Act to the record or the part of the record.

In this case, therefore, to the extent that the information in question can be classified as personal information, the onus will be on AK (the Applicant) to establish that disclosure

would not be contrary to the Act. With respect to all other information on the file, the onus is on PB (the Third Party) to establish that the AK has no right to access **under the Act**. I emphasize these words because much of PB's argument has not addressed the right to information as that right is provided for in the act. Much of PB's argument is based instead on what she feels is fair or unfair. Unfortunately, that is not the test. If the information does not fall within one of the exemptions listed in the Act, it must be provided to AK.

It is to be noted that the classification of information as "personal information" does not automatically exempt it from disclosure under the Act. Section 23 of the Act provides that the public body must refuse to disclose personal information only "where the disclosure would be an unreasonable invasion of a third party's personal privacy". Not every disclosure of personal information is going to be considered an unreasonable invasion of third party privacy. Section 23(2) outlines circumstances in which there is a legal presumption that the disclosure of the information would be unreasonable. Of the listed circumstances, the following may be applicable to the information in PB's file:

- d) the personal information relates to employment, occupational or educational history;
- f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness;
- h) the personal information consists of the third party's name where
 - i it appears with other personal information about the third party; or
 - ii the disclosure of the name itself would reveal personal information about the third party.

Section 23(3) then goes on to outline considerations which must be taken into account in determining whether the disclosure of the information should be considered an unreasonable invasion of the third party's privacy where the personal information in question does not fall into one of the presumptions. Those considerations include:

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny;
- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
- (c) the personal information is relevant to a fair determination of the applicant's rights;
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;
- (e) the third party will be exposed unfairly to financial or other harm;
- (f) the personal information has been supplied in confidence;
- (g) the personal information is likely to be inaccurate or unreliable; and
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

Finally, section 23(4) provides for circumstances where the disclosure of personal information is not to be considered an unreasonable invasion of a third party's privacy, including where:

- (c) an Act of the Northwest Territories or Canada authorizes or requires the disclosure;
- (g) the disclosure reveals the details of a licence, permit or other similar benefit granted to the third party by a public body, but not personal information supplied in support of the application for the benefit;

- (i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body but not personal information supplied in support of the application for the benefit or that is referred to in paragraph (2)(c)

The first thing that we must do, then, is to identify what parts of the record in question can be classified as “personal information”. For the purposes of this review, I have numbered the documents and a copy of the numbered documents will be provided to the public body with this review recommendation. They are listed below, along with my assessment as to whether the information is personal information as defined in the act. For the purposes of this review, and without deciding the issue, I am going to assume that the business name of the day home is personal information.

1. GSN Update Request - under “screen No. 2, the address, Line 1 and the postal code constitute personal information.
2. Series of Questionnaires - the names and addresses at the end of each questionnaire are personal information, as well as the name and signature at the end of the document.
3. Business Licence Print-Out - All the names and addresses which appear on this list are personal information.
4. Letter dated November 20, 2000 - the name and address of the addressee are personal information;
5. Inspection Report - the name and address of the operator/supervisor and the name of the day home are personal information.
6. Criminal Records check - Any reference to names, telephone numbers, addresses, date and place of birth, signature of the applicant and the results of

the criminal record check are personal information

7. Application for Child Day Care Facility - Names (including the name of the day home), addresses and telephone numbers are personal information, as is the signature of the applicant.
8. Letter dated October 30, 2000 - the name and address of the day home are personal information
9. Environmental Health Inspection - the name and address of the day home and its operator and the signature of the applicant are personal information.
10. Goals and Objectives - the name of the day home anywhere it appears in the document (there are several) is personal information
11. Sample of daily schedule - there is no personal information in this document
12. Safety plan - there is no personal information in this document
13. Dayhome fire evacuation/emergency procedures - the name of the day home is personal information
14. Floor Plan - there is no personal information in this document
15. Description of Program - there is no personal information in this document
16. Information for parents - the name of the day home and the caregiver is personal information

17. Letter dated November 8, 2000 - the name of the writer is personal information
18. List of child care workers - the names of individuals and any educational credentials they have is personal information
19. Excerpt from City of Yellowknife Publication - legal and municipal addresses that appear in this document are personal information
20. Child Day Care Facility Licence - the name and address of the day home are personal information
21. Document #AV010754 - the name and address of the day home are personal information
22. Application for Start-Up - the name and address of the day home and operator are personal information and the applicant's signature are personal information
23. GC160637 - the name of the day home is personal information
24. Contribution Agreement - the name of the day home is personal information, as is any reference to the day home operator or the address of the day home, as well as the signatures of the day home operator(s) and the witness;
25. Itemized Categories Report - this document constitutes financial records of the day home. This will be discussed at further length below.
26. CG160654 - the name of the day home is personal information
27. Contribution - the name of the day home is personal information, as is any

reference to the day home operator or the address of the day home, as well as the signatures of the day home operator(s) and the witness;

28. Financial Information - Again, I will discuss this in more detail below.
29. Certificate of Insurance - the name and address of the day home is personal information
30. Clearance Form - the name of the day home is personal information.
31. Document AV016284 - the name and address of the day home is personal information
32. Program Contribution Attendance Report (x2) - the name and address of the day home and the signature of the applicant are personal information
33. Document AV012278 - the name and address of the day home is personal information
34. Program Contribution Attendance Report - the name and address of the day home and the signature of the applicant is personal information
35. Application for program contribution - the name and address and telephone number of the day home and the signature of the applicant is all personal information
36. Document CR154310 - the name and address of the day home is personal information

37. Receipt - the name of the day home is personal information
38. Letter dated August 29th - the name and address of the addressee is personal information, as are the names that appear in the last paragraph of the letter.
39. Note to file - any references to the names of individuals are personal information.
40. Letter dated August 21st - the name, signature and address of the sender, any reference to medical conditions of individuals, and any reference to any person's occupation is personal information.
41. Note to file - the name of the day home, and the names of any individuals and their relationships to one another is all personal information.
42. Untitled note - all references to names of individuals other than employees of the Government of the Northwest Territories, are personal information.
43. Note to file - the name of the day home and the names of individuals and their training or credentials contained in the note are personal information
44. Complaint - the name, address and telephone number of the day home operator and the name, address and telephone number of the complainant is personal information

Before discussing whether the disclosure of this personal information would be an unreasonable invasion of the third parties' privacy, I would like to comment on the "business" aspect of this case. Personal information is defined as information about an identifiable individual. As such, it has been held that corporate information will not generally be considered to be personal information except in circumstances where the

corporate identity is so closely linked to an identifiable individual that the corporate information can reasonably be construed as also constituting the individual's personal information.

In Order 16, former Ontario Information and Privacy Commissioner Linden canvassed the issue of personal information as it relates to business entities. He stated that:

The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear. The types of information enumerated under subsection 2(1) of the Act as "personal information" when read in their entirety, lend further support to my conclusion that the term "personal information" relates only to natural persons.

Former Commissioner Linden made further comment on this in Order 113 as follows:

It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

Ontario's Assistant Information and Privacy Tom Mitchenson expanded on this in Order P364 which dealt with the financial records of a farmer:

Having reviewed the record and the representations provided by the various parties, I feel that this appeal represents the type of exceptional

circumstance envisioned by Commissioner Linden in Order 113. The affected parties in this appeal are a couple who own the cattle farming operation which is described in the record. They are in the business of buying and selling cattle, and their livelihood depends to a large extent on the health and condition of their herd. The record contains detailed information about the history, management and health of their cattle, including a description of all purchases and sales made over a two year period. In my view, there is a sufficient nexus between the affected parties' personal finances and the contents of the report to properly consider the information contained in the record to be the personal information of the affected persons. Therefore, I find that the record qualifies as the personal information of the affected persons under section 2(1) of the Act, in the particular circumstances of this appeal.

Similarly, in this case, any direct reference to the name of the business or the finances of the business are, to my mind, so closely associated with the individual who runs the business as to be personal information. The day home is not only owned solely by PB, she runs the business in her home. I have therefore included any reference to the name of the day home as personal information.

Having, therefore, identified which parts of the records are personal information, we then have to determine whether the disclosure of that personal information would be presumed to be an unreasonable invasion of privacy.

In my opinion, the personal information identified in the following records fall under one of the presumptions of unreasonable invasion of privacy under the presumption indicated:

1. Section 23(2)(h)
2. Section 23(2)(h)

4. Section 23(2)(h)
5. Section 23(2)(h)
6. Section 23(2)(h)
7. Section 23(2)(h)
8. Section 23(2)(h)
9. Section 23(2)(h)
16. Section 23(2)(h)
18. Section 23(2)(d), Section 23(2)(h)
21. Section 23(2)(h)
22. Section 23(2)(h)
23. Section 23(2)(h) except with respect to the name/signature of the witness
24. Section 23(2)(c), Section 23(2)(f) but only with respect to the column entitled "Amount"
27. Section 23(2)(h) except with respect to the name/signature of the witness
28. Section 23(2)(c), Section 23(2)(f) but only with respect to the column of figures
29. Section 23(2)(h)
31. Section 23(2)(h)
32. Section 23(2)(h)
33. Section 23(2)(h)
34. Section 23(2)(h)
35. Section 23(2)(h)
36. Section 23(2)(h)
38. Section 23(2)(h)
40. Section 23(2)(a), Section 23(h), Section 23(d)
44. Section 23(2)(h)

The records noted, to the extent only of the personal information contained in them as identified above, are exempt from disclosure under the Act because of a presumed unreasonable invasion of a third party's privacy.

For those records which contain personal information which does not fall within one of or more of the sections in which an unreasonable invasion of privacy is presumed, we must consider whether the disclosure of the information would, nonetheless, be an unreasonable invasion of privacy. Section 23(3) provides a non-exclusive list of circumstances that should be considered when determining whether the release of information might constitute an unreasonable invasion of a third party's privacy. PB has asked me to consider one of the listed circumstances, that being that she (the third party) will be exposed unfairly to financial or other harm.

I have had the advantage of having been able to review all of the requested information. The first thing that I would observe is that it would be difficult to use any of the information in the file in a negative way. There is no history of complaints and most of the information on the file is purely administrative in nature. However, PB is convinced that the Applicant intends to use the information he receives to disparage her reputation and to create bad publicity for her that will ruin her business. PB is convinced that the Applicant has already made remarks to other clients of hers that were meant to hurt her business. I make no comment on whether or not that happened. I will assume, for the purposes of this review, that it did. Even in those circumstances, however, I am not satisfied that PB's concerns are sufficient, by themselves, to prevent the disclosure of the information. The Act requires us to look at **all** the relevant circumstances in determining whether the disclosure of the information might be an unreasonable invasion of the third party's privacy. The day home licencing process is there for a purpose and that purpose is to ensure quality control and to protect the health and safety of children attending day homes. It is important for parents looking for day care for their children to have an independent way to confirm the safety and health record of a day home. This competing interest is as strong, or stronger, than the possibility, as yet unproven, that the information in the file might expose PB to financial harm. Having reviewed the records in question, I am not satisfied that PB has provided sufficient evidence that she will suffer any harm from the release of the records in question. In coming to this conclusion, I have relied on the

interpretation which has been given to an identical provision in the Freedom of Information and Privacy Act of Ontario. I have reviewed most of the Orders of the Ontario Information and Privacy Commissioner which have considered this section of the Act. The Commissioner's comments in Order # P-606 is typical:

The Board submits that should the record be disclosed to the appellant, she would be free to show this information to members of the public which could be harmful to the reputation of the affected person.

The Board, however, has not presented the necessary evidence to establish a sufficient causal connection between the disclosure of the record at issue and the harm envisaged. In the absence of such evidence, and based on my own evaluation of the record at issue, I find that section 21(2)(e) is not a relevant consideration in determining whether or not to disclose the personal information.

CONCLUSION AND RECOMMENDATION

In light of the above discussion, it is my recommendation that the records requested by the Applicant should be provided to him, subject to editing to remove the personal information outlined above. If the Minister or the Department require any further direction as to the information which should be severed before the records are released, I would be happy to provide a marked version of the records.

Elaine Keenan Bengts
Northwest Territories
Information and Privacy Commissioner
November 12, 2002